

ARTICLES

VICTIMS AND VOYEURS AT THE CRIMINAL TRIAL

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Law is all about human life, yet struggles to keep life at bay. This is especially true of the criminal trial. With the public typically ranking crime our country's most important problem, the criminal trial reflects and ignites large passions. Yet it usually seeks to exclude much of that passion from its stage as the trial proceeds with its structured process of legal proof and judgment.

Maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about. Distinctive legal rules of procedure, jurisdiction, and evidence insist upon and define law's autonomous character—indeed constitute the very basis of a court's authority. The mob may have their faces pressed hard against the courthouse windows, but the achievement of the trial is to keep those forces at bay, or at least to transmute their energy into a stylized formal ritual of proof and judgment.

But there is always a struggle between this idealized vision of law—which proclaims that law is and must be separate from politics, passion, and public resistance—and the relentless incursion of the tumult of ordinary life. This struggle was at the heart of the federal courts' most significant project of this century: the effort beginning with *Brown v. Board of Education* to desegregate American life, in which the courts have both sought to disregard white resistance and yet inescapably been forced to take account of it.¹ An analogous struggle is enacted daily in criminal courts throughout the country.

At the criminal trial, the struggle is largely played out over *narrative construction and reception*—a struggle about what stories may be told at trial, how stories must be told, who is the appropriate audience, how stories must be heard. Storytelling must conform to certain dis-

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¹ See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

tinctive legal rules of storytelling contained in the law of evidence and procedure. Seen this way, in fact, the entire law of evidence, and much of the law of procedure, is really a law of narrative—a law of narrative transactions. Yet, for all the rules that seek to maintain the trial as a place separate and apart, there are unceasing pressures to let ordinary life in, to allow people to tell the stories they tell in ordinary life in the way they usually tell them.

In the narrative transactions of the criminal trial, two categories of insurgent participants pose the greatest challenge today, threatening to invade the criminal trial with their anger, fear, and ignorance, as well as their concern and curiosity. These are, first, crime victims, which through the modern “victims’ rights movement” are pressing for an ever-larger but problematic role, and, second, the general public, which is terrified of crime and for that reason and others has become fascinated by criminal trials and presses for involvement in new and rather alarming ways as both audience and participant.

These two categories of insurgent participants are my immediate subject. Beginning with the roles of crime victims, I first examine the growing use of “victim impact statements” at sentencing. I then consider the increasing presence of the general public as a voyeuristic audience for major criminal trials. Each has a place, I think, in spite of serious risks. But my treatment of these interrelated issues of victim and public also reflects a broader underlying purpose, which is to augment our understanding of the criminal trial by examining it as a type of narrative and as a forum for narrative transactions. Ideas about “narrative” and “storytelling” have become significant in legal scholarship in recent years—primarily as oppositional to traditional modes of legal argument and as a method of struggle by minorities, women, and other marginal groups.² In fact, though, narrative and storytelling pervade the law, from the competing narratives in trial court proceedings to the legal and historical narratives appearing in Supreme Court opinions. This Article should be seen as in part an effort to broaden the study of narrative in the law today—not only to examine narrative in a wider range of legal arenas but also to emphasize neglected complexities of how narratives are constructed and presented and produce

² See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989). Critiques of some of this scholarship include Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993), and Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

their various effects. Thinking about the trial as narrative or storytelling can bring fresh attention to the communicative exchanges central to the trial, directing us to the fact that the trial is centrally an arena of speakers and listeners, that the trial's search for truth always proceeds by way of competing attempts to shape and present narratives for particular audiences, that the form of telling and the setting of listening affect everything, and that telling and listening are complex transactions that jointly create meaning and significance.

I. VICTIMS

A. *The Victim in Trial Narratives*

The existence of a victim, of course, is what prompts the criminal trial. The earliest court proceedings in England denominated "criminal" were, in fact, private prosecutions brought by the victim directly.³ But as the criminal process evolved, prosecution became a government function. The victim became a trigger and a witness for the prosecution, rather than the prosecution's director. Put another way, the victim was no longer the guiding narrator of the proceedings but became instead just one of many storytellers at trial. Today, criminal litigation against the alleged wrongdoer is controlled by a government prosecutor, not by the victim, and it is the government, not the victim, that decides which witnesses to present, guides the stories they tell, and shapes opening and closing statements to the jury. Thus, the modern prosecution is not really a battle between the victim and the accused. A criminal prosecution claiming that Smith was robbed by defendant Jones is not captioned *Smith v. Jones* but is called *The State v. Jones* or *The People v. Jones*. The abstraction of the "state" calls the wrongdoer to account, displacing the victim because the wrong is seen as one against the community as much as any particular victim.

For many, substituting the state for the victim in prosecuting crime is a great achievement. It keeps at bay the immediate passions of an injured victim, especially unmediated revenge. It transforms a private vendetta into a public concern.⁴ It depersonalizes law enforcement and underscores the public values at stake. Government prosecutors are guided by role norms that are supposed to make them more objective and public-spirited than the typical private lawyer—hence the motto inscribed in a rotunda in the U.S. Department of Justice: "The United States wins its point whenever justice is done"

³ See John H. Langbein, *The Origins of Public Prosecution at Criminal Law*, 17 AM. J. LEGAL HIST. 313 (1973).

⁴ The central myth about the birth of law in Western literature, Aeschylus' *Oresteia*, is an account of a transformation from a system of blood revenge to a public process of adjudicating crimes. See Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

There is much that is noble in this government role. But there is also a loss, or at least an asymmetry. The accused, after all, is represented by a lawyer devoted to his or her client's interests rather than "justice," and who thinks, in effect, that "defendants win their point only when juries vote not-guilty." The professional prosecutor typically identifies with other law enforcement professionals and usually does not display the same personal association and identification with the victim that the defense lawyer displays for the defendant. The victim can be pushed to one side—left in the dark about court dates, treated as an emotional annoyance by law enforcement bureaucrats, "victimized" a second time (as victims and their families often complain today). And the victim loses control of how his or her story is presented.

The place of the victim in the evolving courtroom narrative is most problematic in a murder case, where the victim is dead—dead and silent, unable to tell his or her own story. In many cases, in fact, victims are murdered *in order to* silence them.⁵ The absence of the murder victim at trial can be a gaping absence, but it is still absence, and presence is almost always more vivid than absence. Thus, in the competing narratives of a trial, the narrative of the murder victim has a certain comparative disadvantage—not simply because these victims are absent but because the plots of their lives are over; we know how their stories end. Even if against our will, a murder trial inevitably draws us into the defendant's story simply because it remains incomplete and therefore invites us to supply imagined endings as the defendant's fate unfolds in court. By contrast, there is no suspense in courtroom narratives about the murder victim.

Murder victims are silenced in another respect. Because they cannot testify or be cross-examined, even their utterances and writings while they were alive may be excludable. Consider Judge Lance Ito's ruling on the admissibility of various pieces of evidence of O.J. Simpson's stalking and abuse of Nicole Brown Simpson in the notorious murder trial. The judge admitted evidence of O.J. Simpson's past behavior that living witnesses had observed; but he excluded evidence of what Nicole Brown Simpson herself had told others O.J. Simpson was doing and excluded what she had written in her diary. What Nicole Brown Simpson told others was hearsay; because she was no longer alive, she could not be cross-examined about what she had said and written. The fact that there was no reason to doubt the truth of what she told others (or wrote), that what she said appeared to be distinctly reliable hearsay, was irrelevant. Evidence that tended to show that her husband had a motive to kill her became inadmissible *because* she

⁵ See, e.g., *Booth v. Maryland*, 482 U.S. 496, 498 (1987), discussed *infra*. There, an elderly couple was murdered in the course of a robbery because the robber "knew that [they] could identify him." *Id.*

was killed—because (on the prosecutor's theory of the case) the alleged motive was a successful spur to action.⁶

Therefore, particularly in murder cases, where the victim is absent and silent, there is an understandable effort to make more present the life that was taken and to vocalize the suffering the murder caused. One is reminded here of an extreme case, the scene in Richard Wright's novel *Native Son* where the prosecutor actually wheels the dead and battered body of one of Bigger Thomas's victims into court to make her visible—a grotesque device that counters Bigger's grotesque device of trying to make his first victim literally invisible by incinerating her body in the family's furnace.⁷ More realistically and currently, the prosecutors in the O.J. Simpson case repeatedly showed the jury photographs and videotapes of the battered, bloodied bodies of the murder victims, not simply to establish technical facts about how they were murdered but precisely to balance the technical facts, and to insist on the vivid human particularity of the people whose lives had been extinguished. Similarly, the prosecutors played tapes of Nicole Brown Simpson's 911 phone calls to the police, not simply to give the jury some factual background for the murders (which a transcript of the phone calls could do) but to let them hear Nicole Brown Simpson's voice, let them hear her fear, to give her presence. And at the end of her closing to the jury, prosecutor Marcia Clark replayed the 911 tapes and said: "Usually I feel I'm the only one left to speak for the victims. But Nicole and Ron are speaking to you."⁸

Others also try to fill the gap created by the victim's silence and absence in the narrative exchanges of the murder trial. Because murder victims can neither tell what happened to them nor witness their vindication, surviving family and friends usually try to fill those roles of storyteller and audience. Family and friends tell the victims' stories in an effort to keep the victims visible, as if to say, "We speak in place of those who cannot speak." And they sit prominently in the courtroom audience, as if to say to the other participants, "We are listening in place of those who cannot listen." Like victims themselves in nonmurder cases, survivors sometimes stand back from the criminal

⁶ To be sure, Judge Ito did rule admissible a considerable amount of evidence about O.J. Simpson's prior abuse of his wife. So it might be said that he simply excluded evidence that was not necessary for the prosecution and that was most questionable as a matter of evidence law (and, if admitted, would make a conviction most vulnerable to reversal on appeal). There is truth to this, but the excluded evidence would have significantly added to the cumulative weight of O.J. Simpson's prior abuse. It is the cumulative evidence of abuse that arguably demonstrated the degree and intensity of his obsessiveness for control, and therefore made more plausible the argument that it could ultimately escalate to murder. In any event, the excluded evidence does underscore the various ways in which victims are silenced at trial—silenced by their murderers but also by legal rules that reinforce that silence.

⁷ RICHARD WRIGHT, *NATIVE SON* 305-08 (Perennial Library ed. 1966).

⁸ *A Haunting End to O.J. Trial*, S.F. EXAM., Sept. 30, 1995, at 1.

process with their own numbed silence; but like living victims, they commonly push with vocal sorrow and rage to be included. They, too, want a presence.

Modern law enforcement continues to struggle to find an appropriate place for victims and survivors in the criminal process without sacrificing the public purposes that structure and constrain the criminal trial. Indeed, no movement in criminal law has been more powerful in the past twenty years than the "victims' rights" movement, which has sought to enhance the place of the victim in the criminal trial process.⁹ In significant part, this movement reflects the sense of many that the law had evolved too far in the direction of protecting the rights of defendants and had slighted the interests of victims. Thus, the contemporary victims' rights movement has successfully advocated not only that specific legal rules be modified to give the interests of crime victims greater weight (for example, definitions and proof rules in rape cases) but also that crime victims be assured of restitution, compensation, and counseling, that victims be consulted before plea bargains are finalized, and that victim impact evidence be considered at sentencing.¹⁰

B. "Victim Impact Evidence" in Trial Narratives

The use of victim impact evidence in death penalty sentencing has been an explosive issue on the Supreme Court in recent years, and is my focus here.¹¹ In 1987, in a case named *Booth v. Maryland*,¹² a

⁹ For discussions of the modern victims' rights movement in criminal law, see, e.g., GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME* (1995); ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* (1986); ANDREW KARMEN, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* (1984); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *FINAL REPORT* (1982); U.S. DEP'T OF JUSTICE, *FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME* (1986); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *MISS. L.J.* 515 (1982); Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411 (1993); Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 *STAN. L. REV.* 937 (1985); Donald Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 *AM. CRIM. L. REV.* 233 (1991); Leroy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 *WAYNE L. REV.* 125 (1987); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 *HARV. J.L. & PUB. POL'Y* 357 (1986); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *PEPP. L. REV.* 117 (1984).

On the history and theory of victimhood more generally, see JOSEPH AMATO, *VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING* (1990); WILLIAM RYAN, *BLAMING THE VICTIM* (1971); and CHARLES SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* (1992).

¹⁰ Representative samples of items on the victims' rights agenda are contained in the Federal Victim and Witness Protection Act of 1982, 18 U.S.C.A. §§ 1512-1515, 3663-3664 (West 1994 & Supp. 1995), and the Federal Victims of Crime Act of 1984, 42 U.S.C.A. §§ 10601-10604 (West 1995).

¹¹ In addition to the more general literature on the victims' rights movement cited at note 9 *supra*, writings specifically on victim impact statements include: Vivian Berger, *Payne and Suffer-*

closely divided Court held that it is unconstitutional for prosecutors to use a victim impact statement (VIS) during capital sentencing.¹³ But in a 1991 case, *Payne v. Tennessee*,¹⁴ a newly constituted Court overruled *Booth* and made most victim impact evidence admissible at capital sentencing—over angry and impassioned dissents.

Booth involved a brutal double murder of an elderly couple during a robbery in their home. The VIS in the case, given as an appendix to this Article, is instructive about what such statements are like and what being a murder victim's survivor is like.¹⁵ The VIS here was a document prepared by an employee of the state Division of Parole and Probation—who refers to herself as “the writer”—and was read to the jury by the prosecutor. The Supreme Court summarized the VIS as follows:

The VIS in *Booth*'s case was based on interviews with the Bronsteins' son, daughter, son-in-law, and granddaughter. Many of their comments emphasized the victims' outstanding personal qualities, and noted how deeply the Bronsteins would be missed. Other parts of the VIS described the emotional and personal problems the family members have faced as a result of the crimes. The son, for example, said that he suffers from lack of sleep and depression, and is “fearful for the first time in his life.” He said that in his opinion, his parents were “butchered like animals.” The daughter said she also suffers from lack of sleep, and that since the murders she has become withdrawn and distrustful. She stated that she can no longer watch violent movies or look at kitchen knives without being reminded of the murders. The daughter concluded that she could not forgive the murderer, and that such a person could “[n]ever be rehabilitated.” Finally, the granddaughter described how the deaths had ruined the wedding of another close family member that took place a few days after the bodies were discovered. Both the cere-

ing—*A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77; Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391 (1989); Victor D. Vital, *Payne v. Tennessee: The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497 (1994); Carole Mansur, Comment, *Payne v. Tennessee: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 NEW ENG. L. REV. 713 (1993).

¹² 482 U.S. 496 (1987).

¹³ *Id.* *Booth* was followed in *South Carolina v. Gathers*, 490 U.S. 805 (1989).

¹⁴ 501 U.S. 808 (1991).

¹⁵ Interestingly, one of the things we learn from the VIS is that a sizable part of the pain of being a victim or survivor is telling and listening to stories about the murder, hearing about the murder on television, watching details about the murder at the trial, and so forth. Several of the survivors became unable to listen to further stories about the crime or, for that matter, stories about other crimes. One “can’t watch movies with bodies or stabbings in it.” Another can’t watch television news stories about violence. A granddaughter who had previously been an “avid reader of murder mysteries” can’t read them anymore. As we learn, however, survivors are unable to escape the worst stories about the murder—the stories they tell themselves. Most of the survivors describe re-enacting the crime or its discovery in their imagination again and again, a narrative that just refuses to conclude, rewinding and replaying endlessly.

mony and the reception were sad affairs, and instead of leaving for her honeymoon, the bride attended the victims' funeral. The VIS also noted that the granddaughter had received counseling for several months after the incident, but eventually had stopped because she concluded that "no one could help her."

The government official who conducted the interviews concluded the VIS by writing:

It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.¹⁶

As this summary indicates, the document contained three different kinds of victim impact evidence, all of which *Booth* deemed inadmissible in capital jury sentencing proceedings: (1) evidence about the impact of the crime on the victims and the victims' survivors; (2) evidence concerning the victims' particular characteristics; and (3) survivors' personal opinions about the defendant and the appropriate sentence. I focus here on the first two categories of victim impact evidence, which are the two types of evidence that *Payne v. Tennessee*, in overturning *Booth*, has held admissible.¹⁷ Should these victim impact stories be excluded from sentencing—and, in any event, why are such stories so often perceived as problematic?

Introducing victim impact evidence at the proceeding on whether the defendant should live or die almost always increases the chance that the jury will impose a death sentence. Thus, one basis for opposing such evidence is flat opposition to the death penalty itself. But this was not the rationale of the Supreme Court when it excluded victim impact evidence in *Booth* (nor is it the rationale usually given, at least publicly, by critics who object to victim impact evidence). Rather, the *Booth* majority (like most other critics) argued that this evidence was irrelevant to whether the death penalty should be imposed and would distort and inflame the jury's judgment—thus "creat[ing] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner"¹⁸ in

¹⁶ *Booth*, 482 U.S. at 499-500 (citations omitted).

¹⁷ Evidence in the third category—survivors' personal opinions about the defendant and the appropriate sentence—raises different issues, is relatively uncommon, and is the sort of witness "opinion evidence" that is typically inadmissible. All of the six Justices who voted in *Payne v. Tennessee* to overturn *Booth's* exclusion of the first two categories of evidence were careful not to approve admitting this category of evidence. *Payne*, 501 U.S. at 830 n.2; *id.* at 835 n.1 (Souter, J., with whom Justice Kennedy joins, concurring).

¹⁸ *Booth*, 482 U.S. at 503. Legal rules about the use of victim impact statements can be seen and evaluated like any other problem of evidence in criminal trials. But the legal status of such

violation of the Constitution's prohibition on "cruel or unusual punishments." But these arguments, for the most part, are weak.

1. *Narrative Relevance.*—The *Booth* Court's main argument concerns relevance—a claim that evidence of the suffering of the victims' family and evidence of the victims' personal characteristics are irrelevant to the defendant's blameworthiness and thus irrelevant to the decision whether this defendant should receive the death penalty. But even assuming that blameworthiness is the only measure of relevance in deciding whether to impose the death penalty, why isn't the defendant to blame for the suffering endured by the survivors of someone he or she has intentionally murdered? The *Booth* Court argues that the defendant may have had "no knowledge about the existence or characteristics of the victims' family,"¹⁹ but surely that does not mean that the defendant is without blame or responsibility for that family's suffering. Precedent, as well as common sense, establishes that defendants are deemed blameworthy and responsible for the "probable consequences of [their] actions"²⁰ and that acts done with the same state of mind may have different legal consequences depending on the actual harm caused.²¹

evidence is a special problem for at least three reasons: it has become an issue of constitutional law (the law of evidence is mostly common law or statutory law); it concerns evidence used at sentencing rather than at the guilt phase of a trial; and the leading cases all concern its use in the context of death penalty sentencing. Nevertheless, the issues posed by victim impact statements can be divided into the two questions typically considered when deciding whether certain evidence should be admissible at trial, and the Supreme Court has at least implicitly addressed these two questions in analyzing the status of victim impact statements under the Constitution. First, is the evidence relevant to some issue being decided at trial? Second, assuming that the evidence has relevant probative value, is it likely to have a "prejudicial effect" that outweighs its usefulness—most typically, is the evidence likely to distort the search for truth more than enlighten it? These are both socially contingent inquiries that may change over time. Many kinds of stories have historically been excluded from trial as "irrelevant" because of what we would now call a failure to define the contested issue properly or a blindness to some reliable connection between the story and the contested issue. The idea of prejudice is also socially contingent. Over the years, as social and political attitudes have changed, the prior sexual behavior of defendants or victims, for example, has been deemed either relevant or irrelevant to the proof of certain crimes, and at times unduly prejudicial (and thus excludable) and at times not.

¹⁹ *Id.* at 504.

²⁰ *Id.* at 505.

²¹ *Payne*, 501 U.S. at 819; *South Carolina v. Gathers*, 490 U.S. 805, 818-19 (1989) (O'Connor, J., dissenting); *Booth*, 482 U.S. at 516-17 (White, J., dissenting). In a pre-*Booth* capital case, *Tison v. Arizona*, 481 U.S. 137 (1987), the Court held that the Eighth Amendment did not bar imposing the death penalty on two brothers who had assisted their father in an armed prison breakout and a related kidnapping and robbery that resulted in several murders, even though the brothers themselves had not taken "any act which [they] desired to, or was substantially certain would, cause death." *Id.* at 150. "What was critical to the defendants' eligibility for the death penalty in *Tison* was the harm they helped bring about" and their "reckless indifference to human life," *Gathers*, 490 U.S. at 818, 819 (O'Connor, J., dissenting), regardless of whether they had the intent to kill. As Justice White argued in his dissent in *Booth*, it is common in the law for

As Justice David Souter argues in his concurring opinion in *Payne*, which overruled *Booth*, "every defendant . . . endowed with the mental competence for criminal responsibility" knows that a murder will predictably impose harms on survivors and that the life he takes is that of a unique human being.²² Even Justice John Paul Stevens, who concurred in *Booth* and dissented in *Payne*, concedes this, and he is left to make the curious argument that particular "[e]vidence about who those survivors are and what harms and deprivations they have suffered is therefore *not necessary* to apprise the sentencer of any information that was actually foreseeable to the defendant."²³ It would only "divert the jury's attention," he says.²⁴ But to the extent that predictable and foreseeable consequences of murder actually occur in a specific case, that particular evidence seems to provide a highly relevant reason for punishing a particular defendant more severely.

Justice Stevens embellishes his argument in *Payne* by making a distinction between what a legislature may do when setting general standards for sentencing and what a judge or jury may do in imposing an individual sentence:

The majority . . . fails to differentiate between legislative determinations and judicial sentencing. It is true that an evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis.²⁵

It is hard to see, however, why there is any general problem with case-by-case judicial consideration of harm to survivors (and, revealingly, Stevens fudges his objection by linking it to a claim that the particular

punishment to turn on the harm caused, "irrespective of the offender's specific intent to cause such harm." "[S]omeone who drove his car recklessly through a stoplight and unintentionally killed a pedestrian merits significantly more punishment than someone who drove his car recklessly through the same stoplight at a time when no pedestrians were there to be hit." *Booth*, 482 U.S. at 516.

The argument that different levels of punishment may be appropriate where there are different consequences, despite the fact that the punished people have the same state of mind, is bolstered by important recent philosophical writing on "moral luck." This work has challenged the notion that the moral status of an action is dependent solely on factors under the actor's control, and suggests that the luck of unintended consequences (or of personality or intentions) can affect an action's moral status. See MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 336-40 (1986); Thomas Nagel, *Moral Luck*, in *MORTAL QUESTIONS* 24 (1979); Bernard Williams, *Moral Luck*, in *MORAL LUCK* 20-39 (1981). The notion being challenged—that luck cannot affect one's moral status—has its classic expression in the work of Immanuel Kant. See, e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 62 (H.J. Paton trans., 1964) (1785).

²² *Payne*, 501 U.S. at 838 (Souter, J., concurring).

²³ *Id.* at 865 (Stevens, J., dissenting) (emphasis added and citation omitted).

²⁴ *Id.*

²⁵ *Id.* at 861-62.

harm to survivors is "unforeseeable" or "indirect"). Legislatures punish murder so severely at least in part *because* murder predictably imposes these harms. The actual occurrence of these harms in a specific case seems to be a relevant reason to punish a particular defendant more severely. Certainly if relevant in legislatively setting the general parameters of punishment, it is relevant to the individual punishment decision. Indeed, the relevance of victim impact evidence to sentencing ultimately seems to be conceded even by the *Booth* majority, which is careful to emphasize it is not holding that victim impact evidence must be excluded from *non-capital* sentencing.²⁶

One of the themes of the storytelling movement in law is relevant here. The account of the suffering of the victim's survivors in individual cases is a particularization of a generally foreseeable harm. Particularization, the theorists of storytelling remind us, invites empathetic concern in a way that abstractions and general rules do not, and encourages appreciation of complexity.²⁷ Indeed, something like that insight surely underlies the Supreme Court's constitutional rule that in death penalty sentencing *defendants* must be allowed to introduce any and all mitigating evidence—any and all particularized evidence about their background, upbringing, and so forth, that might lead a jury to conclude that a death sentence would not be appropriate.²⁸ Permitting similar particularization in victim impact evidence likewise encourages empathetic concern for the victim and the victim's survivors, as well as a complex understanding of the defendant's crime.²⁹ To be sure, the defendant's story and the victim or survivor's story are about different matters, but in the context of sentencing they can be seen as counter-stories, which should both be available to the decisionmaker.³⁰ (Indeed, in the most literal sense, victim impact evidence consists of stories of victimized and silenced people, who are the usual concern of many in the storytelling movement.) If particu-

²⁶ *Booth*, 482 U.S. at 507 n.10, 509 n.12.

²⁷ See articles cited in note 2 *supra* and my introductory essay, *Narrative and Rhetoric in the Law, in LAW'S STORIES* (Peter Brooks & Paul Gewirtz eds., forthcoming 1996).

²⁸ *E.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

²⁹ The dissenters in *Booth* and the majority in *Payne* argue that it is only fair to allow evidence about particular characteristics of the murder victim because the Constitution has been interpreted to allow capital defendants to introduce any evidence about their particular characteristics that might lead a jury to decide to mitigate the punishment. It is true, as Justice Stevens says in his *Payne* dissent, that our law often embraces rules "weighted in the defendant's favor" (the requirement of proof beyond reasonable doubt; rules regarding evidence of the defendant's character and reputation). 501 U.S. at 860. But the question is: Why should there be a weighting or asymmetry concerning this particular kind of evidence? If information about the defendant's particular characteristics is thought helpful at sentencing, why isn't the same true of information about the victim's particular characteristics?

³⁰ As Martha Minow has written, "[t]he biggest check on selectivity problems in storytelling lies in the availability of another story." Martha Minow, *Stories in Law, in LAW'S STORIES*, *supra* note 27.

larized storytelling should have a greater place in the law, does not the particularized story of the murder victim and the victim's survivors warrant that place?

In fact, however, many liberals who extol the place of stories in law believe that victim impact statements should be excluded from court. There are reasons to want these stories excluded—for example, opposition to any penalty-phase evidence that makes death sentences or longer prison terms more likely. But if this is the true reason, it makes something clear that is not always clear: For some in the storytelling movement, the point is not simply to strengthen the place of stories in law, but to strengthen stories making particular political points; they are not really making a claim about the general value of storytelling as an alternative way of knowing and persuading, but rather a claim about the strategic value of *some* stories as an alternative way of promoting a particular substantive point of view.

One might perhaps distinguish here between the relevance of evidence about the harm suffered by the survivors (the first category) and the relevance of evidence of the victim's particular characteristics (the second category). On the one hand, the latter evidence can be seen as simply an extension of the first category—a particularization of the harm caused. This is how the *Payne* majority sees it—characterizing this evidence as simply “offering ‘a quick glimpse of the life’ which a defendant ‘chose to extinguish,’ ” showing “each victim’s ‘uniqueness as an individual human being,’ ” making sure that the jury understands that the murdered person was a specific, situated human being and not just an abstract “victim.”³¹ But such evidence can be seen as not only a *particularization* of a life story but also a *valuation* of that particular life story. To the extent that this category of evidence makes an implicit or explicit claim that the life taken was comparatively more valuable than many other lives and that the death penalty is therefore more appropriate, it raises a distinctive moral problem.³² But the relevance of impact evidence in at least the first

³¹ *Payne*, 501 U.S. at 822, 823 (citations and emphases omitted).

³² Many people, of course, do believe that some lives are more valuable than others—although they would probably prefer to say that some lives contribute more to human betterment than other lives, so their loss imposes more harm on the community. But many others believe such a position is repellent. The majority in *Booth* suggests, albeit in a footnote, that “our system of justice does not tolerate” the notion that “defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.” 482 U.S. at 506 n.8. The majority in *Payne* tries to avoid this issue by insisting that evidence of the victim's particular characteristics “is not offered to encourage comparative judgments of this kind It is designed to show instead *each* victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.” 501 U.S. at 823. One question is whether the jury will distinguish between this particularization and a comparative valuation (and whether, if pushed, the *Payne* majority would say that the jury must do so).

category—evidence about the harm suffered by survivors—seems clear to me.

2. *Narrative Presentation and Reception.*—In spite of this conclusion, however, I do think there are grounds for concern about victim impact evidence—not based on the relevance of the stories told, but on the dynamics of presentation and reception of the stories.

Those who have recently focused on storytelling in law have generally addressed the substance of the stories told and the fact of their particularity but have not explored the dynamics of their articulation, transmission, and reception, which have been themes of narrative theory in literary studies.³³ The law is quite self-conscious about these dynamics in various contexts. Judges instruct juries throughout the trial about how the jury should listen to what it hears—for example, that a given legal standard should provide the framework for listening to factual narratives, that certain evidence is admissible to prove X but not Y, that jurors should disregard certain evidence previously heard, should not be swayed by passion or prejudice, and so forth—and theories of audience reception surely underlie these instructions.³⁴ Rules regarding the testimony of children in abuse cases, the admissibility of “dying declarations” or so-called *res gestae*, and the admissibility of custodial confessions all reflect notions about how the activity and context of storytelling affect the storytellers themselves. Similarly, the traditional concerns about cameras in the courtroom reflect an appreciation of how audiences can affect speakers.

Looking at victim impact evidence as narrative transactions—narratives told and received in a certain way—highlights issues about

Justice White's dissent in *Booth* took on the majority more directly, arguing that the state may, “if it chooses, include as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society.” 482 U.S. at 517. This is apparently a willingness to allow stronger punishments to be imposed on defendants whose victims are perceived to be greater assets to the community. (White points to federal statutes that authorize death sentences for the murder of only certain specified public officials, such as the President, *id.* at 517 n.2, although those statutes can be seen as authorizing greater punishments when a killing is an attack on the state as well as an individual victim.) As noted above, the Court majority in *Payne v. Tennessee* tries to avoid White's argument. However, in other legal contexts, such as civil wrongful death actions, juries are invited to make different-sized damage awards based on the relative harm caused by the loss of the life in question or some similar valuation.

³³ *E.g.*, PETER BROOKS, *READING FOR THE PLOT* 216-37 (Vintage 1985); M. BAKHTIN, *THE DIALOGIC IMAGINATION* 259 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981).

³⁴ It would be an interesting project to examine various “model instructions” for the purpose of excavating and analyzing theories of audience reception that underlie them, including the basic assumption that a judge's instructions can significantly affect how the jury processes what it hears.

this evidence at least as serious as issues about *what* the evidence says.³⁵

(a) *Narrative emotion*.—First, there is an issue of how victim impact evidence is received by its primary jury audience. Such evidence, which usually describes either the emotional responses of survivors or especially appealing characteristics of the murder victim, is likely to invite an emotional reaction from the jury that hears it.³⁶ Is the very fact that victim impact evidence would vividly remind the jury of the awful emotional reality of the crime's impact—one of the reasons such evidence seems relevant—also a reason for excluding it? The Supreme Court has often said, after all, that the decision of whether to impose the death penalty must turn on a "reasoned moral response . . . rather than an emotional one."³⁷ Indeed, more gener-

³⁵ I do not address in the text one aspect of this that the *Booth* opinion discusses: that evidence about the victim and survivors may lead the defendant to want to rebut this evidence, producing a mini-trial about the victim and victim's family that consumes time and distracts attention from the defendant and the crime. 482 U.S. at 506-07. Telling a story often prompts others to tell a story, and this is especially true in our adversarial system, where virtually no utterance by one side goes unanswered by the other. But the argument about distraction really begs the question here, which is whether victim evidence is indeed a distraction from relevant matters or is itself one of the relevant matters. That issue I have discussed in the text above. The length of court time that such matters consume is essentially a management issue that courts are well equipped to handle—indeed, they handle such issues on a daily basis. The fear of distraction is largely chimerical. Indeed, in *Booth* itself there was no distraction problem, for victim impact evidence was presented through the reading of a compact document rather than through the more time-consuming presentation of live witnesses, and there was no defense rebuttal.

³⁶ *Booth*, 482 U.S. at 508-09 ("[T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. As we have noted, any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.' The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.") (citations omitted); see *Payne*, 501 U.S. at 856 (Stevens, J., dissenting) (noting that victim impact evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason"); cf. *id.* at 831-32 (O'Connor, J., concurring) (observing that jurors were "moved by this testimony" about the survivors' emotional suffering, and acknowledging "the possibility that this evidence may in some cases be unduly inflammatory," but concluding that this does not justify a prophylactic, Constitution-based rule that this evidence may never be admitted, because "unduly inflammatory" evidence that renders the proceedings "fundamentally unfair" may be excluded under the Due Process Clause of the Fourteenth Amendment); cf. *id.* at 836 (Souter, J., concurring) ("Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."); see also *Victim Justice*, NEW REPUBLIC, Apr. 17, 1995, at 9.

³⁷ *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (refusing to strike down an instruction at the penalty phase of a capital trial telling the jury to avoid any influence of sympathy); *id.* at 493 ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."); *id.* at 495 ("The objectives of

ally, a central part of the prevailing ideology of law is that it is a realm of reason, not emotion.³⁸

Although I share concerns about the responses that victim impact evidence may provoke and, as indicated below, think judges must be attentive to potential dangers, I do not think such evidence should be faulted or excluded simply because it produces an emotional reaction. First, such a notion would prove (and would exclude) far too much, because a high proportion of now-admissible evidence produces some emotional reaction in jurors. Both conservative and liberal members of the Supreme Court have been blatantly inconsistent about this, invoking the notion that law is "reason not emotion" only when it is convenient to do so. Justice Sandra Day O'Connor, for example, has insisted that death penalty sentencing must be a "reasoned moral response," not an "emotional response," as a reason for rejecting defendants' objections to jury instructions directing jurors not to be influenced by "sympathy."³⁹ But in *Payne v. Tennessee*, where prosecutors had introduced victim impact evidence that she conceded had "moved" the jurors, Justice O'Connor concluded that their emotional reactions were acceptable because the impact evidence "did not inflame their passions more than did the facts of the crime."⁴⁰ Liberals have been inconsistent in the opposite way. Justice William Brennan, for example, joined *Booth v. Maryland*, which excluded victim impact evidence (as the defendant requested) and rested in part on the argument that the evidence was "emotionally charged" and that the death penalty decision had to be "based on reason rather than caprice or emotion."⁴¹ But Justice Brennan saw a place for emotion when, in his dissent in *Saffle v. Parks*,⁴² he agreed with the defendant that it was constitutional error for capital sentencing juries to be instructed not to be influenced by "sympathy"—even though Brennan seemed to acknowledge that sympathy is an "emotion" and is "fairly regarded as a synonym for 'compassion.'"⁴³

The problem with the idea of excluding evidence that produces an emotional response is more fundamental, however, for the glib dis-

fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror."); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (upholding a judge's instruction to a capital sentencing jury that it should not be swayed by "mere sympathy" and affirming that the death penalty decision must be a "reasoned moral response," not an "emotional response").

³⁸ See Gewirtz, *supra* note 4.

³⁹ *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

⁴⁰ *Payne*, 501 U.S. at 832 (O'Connor, J., concurring).

⁴¹ *Booth*, 482 U.S. at 508 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

⁴² 494 U.S. 484 (1990).

⁴³ *Id.* at 514 (Brennan, J., dissenting).

inction between "reasoned" responses and "emotional" responses is far too simplistic.⁴⁴ This insight dates back at least to Plato.⁴⁵ But more recently, scholars from fields as diverse as philosophy, psychology, and neurobiology have demonstrated that emotions have a cognitive dimension and are connected to beliefs in various respects.⁴⁶ For example, emotions can open up ways of knowing and seeing, and can therefore contribute to reasoning. (Fear and caring, for example, can make us attentive to more facts; sympathy may be part of properly assessing mitigation evidence in capital sentencing.⁴⁷) Indeed, reasons are constituted in part by emotion, and are modifiable by emotion. (Fear can be reduced by changing our beliefs; our general views about gay people can be changed by empathy we come to feel towards a gay relative.) Moreover, emotions can reveal beliefs that conscious thought conceals (grief sometimes does this). And emotions are often essential to the completion of a rational response (consider Michael Dukakis's answer during a campaign debate to a question about what he would think if his wife were raped and murdered, an answer that was so abstract and unfeeling as to suggest a not fully rational reaction).

This linkage and dialectic between emotion and reason is especially true of a jury sentencing decision. At the sentencing stage, the jury is not being asked to find a fact (did the defendant do it?), but to make a judgment about an appropriate punishment. That judgment includes implementing retribution, which inevitably draws upon an emotional element.⁴⁸ In death penalty cases, that judgment also includes consideration of all of the defendant's mitigation evidence, which brings into play the jury's sympathy and sense of mercy and also surely involves nonrational elements. Similarly, considering victim impact evidence involves nonrational elements of sympathy and concern.⁴⁹

This is not at all to deny that emotion can be a problem in the courtroom, but rather to affirm that it is inescapable and has an ap-

⁴⁴ I develop some of these points at greater length in *On "I Know It When I See It"*, 105 YALE L.J. 1023 (1996).

⁴⁵ See Anthony Kronman, *Leontius' Tale*, in LAW'S STORIES, *supra* note 27.

⁴⁶ See, e.g., EXPLAINING EMOTIONS (Amelie Oksenberg Rorty ed., 1980); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990); ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGIN OF THE SOCIAL CONTRACT (1990); .

⁴⁷ Cases upholding anti-sympathy jury instructions, such as *California v. Brown* and *Saffle v. Parks*, fail to acknowledge this last point, however. See *supra* note 37.

⁴⁸ See Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

⁴⁹ See *Williams v. Chrans*, 945 F.2d 926, 947 (7th Cir. 1991) ("We must recognize that the state should not be required to present victim impact evidence . . . devoid of all passion.").

propriate place. One should grant that emotion must be bounded if the court is to remain a place of law. But the issue is boundedness, not whether emotion has a place. There must be a limit on certain types of emotional exchanges, such as those that are excessively inflammatory or those based on what we understand as prejudice. In addition, emotional responses must be subjected to reasoned examination; the dialectic between reason and emotion should be explored. But the trial setting facilitates this, for the lawyers on both sides are in a position to offer the jury reasoned argument about testimony, including emotional testimony. After victim impact evidence is presented, for example, the lawyers should be allowed to make reasoned arguments to encourage jurors to think about their emotional responses and test them through thought, and vice versa (both emotions and rational beliefs can be unreliable). The arguments will concern not only the significance of the victim impact evidence but also the weight that evidence should receive given the extraordinary nature of the death sentence, the relevant statutory standards governing application of the death penalty, and the defendant's mitigating evidence that seeks to generate a countervailing sympathy for the defendant.

These arguments can help to make the jurors more self-conscious about their reactions and can encourage reflection. The court can therefore reduce the likelihood of what Paul Brest calls in another context "*selective sympathy and indifference*"⁵⁰ a particularly worrisome possibility here. Some of the concern about victim impact evidence in death penalty cases surely rests upon the fact that in this context the main audience is a lay jury, not a professional judge. There are distinctive concerns about whether jurors will reflect upon their emotional responses. But if the lawyers and the judge do their jobs, the emotional reactions produced by both the prosecutor's victim impact evidence and the defendant's mitigation evidence can be bounded and tested by reasoned argument—an activity that will not

⁵⁰ Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) (emphasis added). The problem of "selective sympathy" can undoubtedly surface in the context of victim impact evidence. Specifically, evidence about the victim's particular characteristics might evoke sympathy only for victims who come from a juror's own racial, ethnic, or class background. See Harris, *supra* note 11. This problem is not peculiar to victim impact evidence. It arises just as much in the context of the defendant's mitigation evidence, where there is a risk that jurors will react sympathetically only to mitigating circumstances that resonate with their own backgrounds. (This is one concern that the Supreme Court has said justifies the use of anti-sympathy instructions at trials. See *supra* notes 37 and 47.) It also arises during the guilt phase of trial, where there is always the possibility that jurors' assessments of witnesses' credibility will rest upon selective identification with certain witnesses that is rooted in nonrational factors. Thus, the risk of selective sympathy—which, in my judgment, is not only one of the most serious problems with victim impact evidence but a serious problem in the criminal justice system more generally—cannot be a basis for excluding victim impact evidence in particular. It can, however, be the basis for efforts by lawyers and judges to make jurors more aware of their possible biases.

obliterate the emotional dimension, but can cabin it and even deploy it to promote a more reasoned decision.

In response to the concern that victim impact evidence may introduce too much emotion into the jurors' sentencing decision, we might also consider some restrictions regarding the form of such evidence. The Maryland statute authorizing the use of victim impact evidence in *Booth* provided that such evidence could be presented in two different narrative forms: a government-prepared document read to the jury or testimony by family members. These two forms of narrative may have very different effects on the jury, though, and concern about emotional effects might justify restrictions on live testimony by survivors.

Some differences between the forms of presenting victim impact evidence give each form advantages and disadvantages for the prosecutor or defense. A VIS document can be shaped, structured, and polished to produce a desired effect. It also has the imprimatur of the "state" as author and therefore arguably gains narrative authority.⁵¹ The judge can also review it in advance and order inflammatory material excised before the jury hears it. But as a written document that is read, it will not have the human immediacy of live testimony from the victims' survivors, which allows their sadness and suffering to be observed, not just explained. And to the extent that the document reports on what others say, it may be unreliable. Live testimony, by contrast, is less shaped, because it must proceed by more fragmented questions and answers and by direct and cross-examination, and in the end is less controllable by both the lawyers and the judge. But since the survivors will be testifying themselves, their evidence is likely to be much more emotionally charged than a VIS document. In the Wisconsin sentencing proceedings for Jeffrey Dahmer, for example, relatives of his murder victims gave live testimony; some testimony was so impassioned and angry that one surviving sister rushed at Dahmer and tried to attack him in front of the judge.⁵²

If given a choice among these forms, prosecutors must decide what effect on the audience they wish to produce, as they must do in choosing how stories are told throughout the trial. The self-conscious

⁵¹ As noted above in the *Booth* case the VIS read to the jury was prepared by a government official, referred to as "the writer" in the VIS. Using indirect discourse, she retells the stories that the victims' family members have told her. But "the writer" also reacts to what she has recounted ("Perhaps [the victims' granddaughter] described the impact of the tragedy most eloquently when she stated that . . ."; "It became increasingly apparent to the writer as she talked to the family members that . . ."). *Booth v. Maryland*, 482 U.S. 496, 511, 515 (1987). We are made aware of the shaping voice of a narrator, and what the survivors are reported as saying gains weight because this calm official narrator stands behind them. And because this official narrator tells us her response to what the survivors have told her, we the audience—and, more important, the audience of jurors—are pointed to an "appropriate" response and thus encouraged to respond in the same way.

⁵² *ABC World News Tonight* (ABC television broadcast, Feb. 17, 1992).

trial lawyer becomes a theorist of narrative forms, and so does a self-conscious judge. A judge concerned about excessively emotional responses that victim impact evidence may unleash might consider requiring the prosecutor to present this evidence to the sentencing jury in the form of a VIS document instead of live survivor testimony. (The defense counsel in *Booth* himself requested the use of a VIS document, precisely to reduce "the inflammatory effect of the information."⁵³)

An obvious problem with this documentary approach is that it might preclude the defendant from directly challenging the victim-survivor statements through cross-examination. But it need not. The defendants might be allowed, if they wished, to call the victim-survivors as witnesses and cross-examine them about their statements in the VIS. Such a system would limit prosecutors' ability to present victim impact evidence in its most vivid form but would allow defendants to decide whether the benefits from confronting live witnesses would outweigh the risks of generating excessively dramatic testimony. In any event, it is settled constitutional law that the Sixth Amendment right to confront witnesses does not require the usual examination and cross-examination of live witnesses at the sentencing stage; sentencing judges all the time impose sentences based on written information in pre-sentence reports that are not subject to cross-examination.⁵⁴ In short, judges seem to have the power to modulate the emotional effects of victim impact evidence by using narrative forms most suitable to this context—reducing, if not altogether eliminating, the problems of how this evidence is received.

(b) *Narrative articulation.*—Other concerns about victim impact evidence relate to the activity of storytelling itself, rather than the audience response. First, as the *Booth* majority noted, "in some cases . . . the family members may be less articulate in describing their feelings even though their sense of loss is equally severe."⁵⁵ This reminds us that every story must be constructed, which requires an ability and skill that exists unevenly in the population. The *Booth* majority goes further, arguing that this is a reason to deem expressions of grief inadmissible, since "the degree to which a family is . . . able to express its grief is irrelevant to the decision whether a defendant . . . should live or die."⁵⁶ In some sense the Court is right, just as it would be right to

⁵³ *Booth*, 482 U.S. at 501.

⁵⁴ See *Williams v. New York*, 337 U.S. 241 (1949).

⁵⁵ *Booth*, 482 U.S. at 505.

⁵⁶ *Id.* As a threshold matter, there must be a story to construct and a storyteller to do the constructing—and some murder victims may leave no survivors. Making victim impact evidence part of the capital sentencing process may make the defendant's likelihood of receiving a death sentence turn on the presence or absence of survivor-storytellers. Narratological questions to one side, the fairness of such a situation implicates matters discussed above.

say that a family's ability to pay for the best lawyers in the world is irrelevant. But the fact that differing abilities may appear arbitrarily in the population does not make it arbitrary to distinguish among the different effects that those differing abilities help to produce. Moreover, as Justice White's dissent suggests, the *Booth* majority's argument proves too much. If courts were to exclude categories of testimony simply because some witnesses are less articulate than others, no category of oral testimony would be admissible.

(c) *Narrative responsibility*.—A more serious narrative problem with victim impact evidence—though one that implicates no constitutional rights of the defendant—concerns the consequences of giving impact evidence on the survivors themselves. We have been assuming thus far that survivors are pushing to have their stories heard and that allowing victim impact evidence to be considered at the sentencing phase promotes the interests of the victims and the survivors. But surely the dynamic of survivor testimony is far more complicated. To tell the story of personal suffering requires the teller to relive that suffering, to retrieve it from repression, and to re-expose wounds that may have started to heal. This may be beneficially therapeutic, but it may not be. Moreover, for survivors to be asked to tell about the victim's particular characteristics in this context invites a predictable selectivity in detail. Typically, if not universally, people have complex and conflicting feelings about family members. But how frequently does victim impact evidence after a family member's murder dwell on these complexities?

Participating in the sentencing process can also add to the survivors' sense of responsibility and can potentially add to the sense of guilt that survivors often feel.⁵⁷ It can create new conflicts. For example, survivors may not in fact want the defendant to receive the death penalty—they may be opposed to it on moral grounds or may think it recapitulates the violence they endured—but once included in the sentencing process, they may feel pressure to join in seeking the death penalty as an emblem of their outrage at the victim's murder. Where the survivors do favor seeking the death penalty, including them in the sentencing process may make them feel as if they have been given the responsibility to persuade the jury to recommend the death penalty. And if the jury that hears victim impact evidence does *not* recommend the death penalty, survivors may feel that they have let the victim down by not being adequately articulate in describing their suffering or by not describing the victim with sufficiently appealing particularity.⁵⁸ This may add to the sense of guilt that survivors often have sim-

⁵⁷ See Berger, *supra* note 11.

⁵⁸ Testimony during the guilt phase of the trial can create some of this anxiety, but at that stage survivor-witnesses typically testify to relatively objective facts—very different from the

ply because they have survived or because they think that somehow they could have saved the victim.⁵⁹

Put more generally, storytelling is often a risky and anxious activity, for there is always the possibility that a story will not be told effectively. And the responsibility to tell victim impact stories, in particular, imposes that risk and anxiety on an already-vulnerable group of people. This may not deter victims' rights advocates from pressing for greater inclusion for victims and survivors at the criminal trial. But at the very least, it reminds us that storytelling has consequences for the tellers as well as listeners. And the consequences may not be what they at first seem.

II. VOYEURS

The victim is the subject of the trial, so the victim's place as at least a character in the criminal trial's narrative is definitional. This is not true of the general public, whose connection to the trial narrative is less definite. Indeed, there is considerable ambivalence about the general public's relationship to the trial; in some senses it is an indispensable audience and participant, in other senses a deeply distrusted one, always in danger of becoming a mob or "public opinion" that can assault and undermine legal processes. But whatever the ambivalence, the general public's increasing engagement with criminal trials is having important consequences.

Four benign aspects of the public's role stand out in traditional American ideas about the criminal trial. First, although the public is not the direct subject of the trial, the public is a direct object or target of the trial, for a central purpose of punishing particular individuals is to deter criminal behavior by others. Put another way, the public is a primary audience for the trial, although it has traditionally learned about the trial through the heavy filter of media accounts.

Second, the public is a watchdog. Its presence at criminal trials is thought to assure the sort of outside scrutiny that can help to prevent injustice. Indeed, it is for that reason that the Constitution has been interpreted to require that trials must almost always be open to members of the public and the media. Note that this constitutional requirement means only that the public and the media must be admitted insofar as courtroom space permits; not all members of the public have to be admitted, and, more importantly, there is no requirement that the media must be allowed to televise court proceedings, which

accounts of subjective suffering or the heavily shaped victim portraiture in victim impact evidence.

⁵⁹ See, e.g., Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7 (1987).

would allow all members of the general public to see the trial for themselves. *Representatives* of the public must generally be allowed to attend criminal trials, not members of the public directly.

Third, what makes the criminal sanction unique is that it is said to be an expression of public morality, to embody the moral condemnation of the community. This means that a particular trial narrative is usually part of a broader social narrative, and the public is generally implicated in at least the latter. A related notion is that the trial is supposed to channel the retributive desires of the public. We can call this the public as voice. Once again, however, this public role (of community morality and retribution) is mediated and restricted. For one, at the legislative level, public morality is expressed through general norms, not judgments about what particular individuals have done; indeed, the Constitution prohibits legislatures from adopting bills of attainder that punish particular individuals directly. In addition, at the trial itself, when a general norm is applied to particular behavior, public morality is expressed through a jury, a representative body that is supposedly screened for bias and restricted in what it may hear and how it may assess what it hears. (In origin, of course, the jury consisted of members of the community with direct knowledge of the offense.) Put another way, the general public is always kept at least one step removed from judgments in particular cases.

Fourth, and lastly, the public bestows or withholds public confidence in the criminal process, and this can either weaken or strengthen the public's faith in its government more generally.

In the past decade or two, the public has become more engaged as an audience for and participant in criminal trials than before. This may be part of a broader cultural interest in law—ranging from mass-market entertainment like “L.A. Law” and John Grisham and Scott Turow best-sellers to the real-life increase in litigiousness. But the focus on the criminal trial is a distinct subset of this general public engagement. This engagement may result from a greater public fear about crime. In any event, it is a development that has been propelled and facilitated by the new technology of cameras in the courtroom and Court TV, which have made the general public an immediate audience for many trials. Criminal trials have also received increasingly prominent coverage in the print media. Of course, there have been celebrated and notorious trials throughout U.S. history. But today there is almost always a trial that absorbs public attention, and the degree of absorption seems greater than ever before. Criminal court is always in session for the public audience. Over the past several years, day after day, some criminal trial or other has been treated by the media as a top national news story and received by the general public in that way—recall only William Kennedy Smith, Jeffrey Dahmer, Bernhard Goetz, the Menendez brothers, the Bobbitts,

Heidi Fleiss, the police officers who arrested Rodney King, and most recently and most flamboyantly, O.J. Simpson. Each trial is treated as a major cultural event and thus becomes one. These developments probably make the public better informed, as advocates of the televised coverage of criminal trials argue. But that characterization does not quite capture the broader cultural consequences of the public's greater involvement in trials.

These criminal trials have become a central moral arena for society. Because the criminal law intersects so many areas of U.S. society, the criminal trial is often the most prominent place where large moral issues are scrutinized—ranging from racial issues to assisted suicide. Criminal trials have always been a place for society to draw boundaries, but the trial has taken a more important cultural place in drawing these moral boundaries as other institutions that have traditionally engaged in moral linedrawing, such as religion and the family, have declined in strength. Moreover, the criminal trial has become an arena in which social deviance is explored as well as defined—the twisted deviance of Susan Smith, the apparently brazen evil of the Menendez brothers.⁶⁰ The main dynamic at the trial is to support the norms of socially acceptable behavior by defining otherness, to mark off the ways the guilty defendant is different from the law-abiding public audience. But by providing the public with a close-up view of individuals on trial, by embedding the deviant act in circumstances that are often not themselves deviant, by allowing the full consideration of all the excuses offered up by defendants, the public also comes to experience the ways it is like, not simply different from, the criminal.

The criminal trial is also an important way for the public to confront its anger and fear over criminality, which have grown over the past several decades such that crime is now the public's number one concern. The point here is not simply that the result of a trial can satisfy the retributive urges of the general public, although it can surely do that. The form of the trial—its structure and formality—is itself part of that coming to terms. The trial structures social disorder, and thus makes it less disturbing and even enjoyable. It is the sustained process of imposing the legal order on criminal violence that reaffirms that life's disorder can be controlled. One of the great cultural appeals of a television series like *Perry Mason*, a series that all

⁶⁰ The highest visibility cases over the past several years have certain common subject matters and themes. Most involve a riveting role reversal, as when a celebrity or member of some respectable elite is accused of being base (Kennedy Smith, Simpson, the Menendez brothers, Fleiss and her clientele, the Rodney King police). Most involve either matters of sex (Kennedy Smith, Dahmer, the Bobbitts, Fleiss, Simpson) or race (Simpson, Rodney King). Only a few—Susan Smith's killing of her children, for example—rivet precisely because of the emergence of horrifying deviance out of utter ordinariness (although here too the notoriety developed out of a major role reversal: the pleading mother revealed to be the hunted murderer).

but defined "law" for a generation of Americans, was the patterned closure of each program. The truth was always outed, the true criminal revealed, and the vindicated innocence of Perry Mason's client stood for the vindicated order that the legal process predictably imposed. The appeal of the classic detective story is similar, given its reiterated form: a puzzle of violence presented and ultimately solved, and solved through orderly reasoning. Real-life trials obviously do not have the neatness of the trials represented on *Perry Mason*, but they have some of its patterned quality—and, above all, they usually reach closure.

Not unrelated is that the criminal trial has become a source of entertainment. Part of the appeal of the criminal trial is precisely that real people have been hurt and that a real defendant may be exposed and punished. But its reality does not interfere with—indeed, it arguably enhances—its entertainment value. The trial can have the organized combat of spectator sports, the emotional tumult of a soap opera, and the heightened suspense of a thriller. When people say that the O.J. Simpson trial was a circus, part of what they surely mean is that it became, like a circus, gaudy public entertainment. We see this more generally now, as much of the media's coverage of "news" has blurred into "entertainment," with entertainment values now shaping what is covered, in what detail, and in what manner.

The trend toward a wide television audience for criminal trials can be usefully considered alongside another recent development in television that rivals it in importance and to which I think it is linked—the rise of the *Oprah*-style television talk show. With each, the subject is usually some socially extreme behavior, behavior that tests or transgresses current boundaries of publicly acceptable conduct. The subjects are explored by considering the lives of actual people. And the public audience to the spectacle and the exploration is critical to each.

At the center of both *Oprah* and the trial is judgment. On *Oprah* the studio audience is invited to ask questions, but its critical function is to offer judgments of the behavior being displayed—and in articulating its judgments the studio audience is a stand-in for the audience at home, which is also invited to judge. What is critically important when *Oprah* invites judgments is this: on *Oprah*, everyone's judgment has the same weight; every judgment is valid. To *feel* validates judgment. The implicit credo of *Oprah*'s audience is "I feel, therefore I may judge." The audience is endlessly valorized because *Oprah* treats its judgments so respectfully. And the cultural impact of *Oprah* is that it has increased the status of the ordinary person's judgment.

The widening coverage for criminal trials also invites public judgments. Part of the appeal of the trial for the public audience is that it invites these judgments: Did the defendant commit the crime?

Should he be convicted? Is this or that witness lying? Are the lawyers doing a good job? And so forth. As the public has been allowed into the trial more and more as a direct audience, it has been encouraged more and more to make these judgments.

But surely there is a problem. Judgment at trial is carefully structured and circumscribed. Most things about the trial refute the idea that "I feel, therefore I may judge." Public judgment is rendered by an institution that represents the public—the jury—but it is a representative institution, whose members are screened and are expected to conform to distinctive and circumscribed role behavior. Only appropriately unbiased people are supposed to serve on juries and to judge. The jury may not hear everything, only evidence admitted in accordance with the restrictive law of evidence and procedure. Jurors must be a constant rather than intermittent audience. They may not be there one day and gone the next, but must hear and consider everything that is admitted into evidence; and they must wait until the end of the trial, until they have heard all the evidence, to discuss the case with others and make their judgments. And, of course, the jury is expected to follow the instructions of the judge, instructions that reflect established legal rules.

The general public audience is restricted in none of these respects. It may be biased. It may be exposed to lots of evidence and argument that are inadmissible in court—indeed, the media that brings the public the trial itself also typically brings the public lots of additional evidence and argument. At the same time, the public is typically an intermittent audience and hears only part of the story. And the public is either ignorant of the legal instructions given to the jury or feels itself unrestrained by those instructions. Still—and this is the crucial fact—the public feels itself entitled to pass judgment. "I feel, therefore I may judge."

I do not wish to romanticize the jury, which in some respects is infected with similar deficiencies, perhaps increasingly so. For example, the very idea of a jury as objective and unbiased is being replaced by the idea of a jury as a collection of representative biases. It was a major step forward when we moved from a jury system that was outrageously elitist and exclusionary to one that was supposed to be "a fair cross-section of the community." But the idea of "fair cross-section," which was initially a tool for reducing biases on juries, is today often used to legitimate biases as long as they are representative. Consultants are trying to make more scientific a process of picking a jury whose biases one side or the other likes—using the same techniques of polling and focus groups used in politics. Moreover, there is at least anecdotal evidence of an increase in jury nullification—an in-

crease in jurors' thinking that they are "the people" who therefore have the right to remake or disregard the law.⁶¹

But in spite of undoubted deficiencies in jury performance, the jury audience remains sharply differentiated from the public audience by pervasive restrictions on what it hears and how it behaves. And a real tension exists between these two main audiences of the trial. The jury decides, but the public separately decides on different evidence and in accordance with different criteria. What is disturbing is the public's increasing sense that it is either on a par with or superior to the jury. Before and during a trial, the public is constantly polled to see whether it thinks a notorious defendant is guilty or innocent, as if the facts to be developed at trial were incidental to understanding. Following a jury verdict, people on the street are interviewed about what they think, as if their judgment was adequately informed. Or they riot, as they did after the Rodney King verdict, and their rioting is seen to embody a superior truth to that determined by the jury. It matters not at all that the rioters may know next to nothing about the actual trial or about rules like a requirement of proof beyond reasonable doubt, and so forth. The trial becomes a mass political event, not a legal process—at least, for the public audience it is one thing, and for the jury audience it is another.

In a very real sense, there are now two trials: one for the jury and one for the public. Part of the trial directed to the public is really directed toward the jury, of course. Before the jury is picked in high-profile cases—indeed, from the moment of arrest—trial lawyers increasingly lay out their versions of the story to the public in large part to affect the jury pool. One audience will become the other. Even after the jury is selected, the lawyers know that public opinion has a way of seeping into the courtroom—by influencing the lawyers, perhaps by influencing the judge, and maybe even by influencing the supposedly isolated jury. All the while, the lawyers may be polling or conducting focus groups in the community, with the general public treated as a proxy for the jury to test what arguments are likely to work in court.

But the trial participants address the general public for other reasons, both before and after the jury is chosen. They see the general public as an important audience in its own right. There is a separate trial for them. In part, this reflects the simple fact that "[t]he eagerness of a listener quickens the tongue of a narrator."⁶² But the "narrators" also have a greater self-conscious awareness of the various roles the public audience can play. In addition, the defense is concerned about the defendant's public reputation, which is not necessar-

⁶¹ *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at 1.

⁶² CHARLOTTE BRONTE, *JANE EYRE* 296 (Random House 1993) (1847).

ily defined by the jury verdict, and all the lawyers may be concerned about their own public reputations. They may do things in the courtroom, as well as outside, that cater to the broader public audience. The media may themselves help to run a separate "public" trial for the public's entertainment and their own financial gain.

We saw all of these things and much more in the O.J. Simpson murder trial, about which a few separate words seem appropriate. This most notorious and publicized criminal trial of our time was both wildly aberrational and yet utterly revealing about general trends—and in any event, has become an inescapable touchstone for reflections about the criminal trial today. The grotesque spectacles outside the courtroom and in the media—and the public's insatiable appetite for the case's mixture of race, sex, violence, and celebrity—seriously damaged and debased the courtroom trial (which contained quite enough disturbing elements by itself). At every point there was a trial before the broader public at least as intense as the trial before the jury, and this broader public trial, magnified and distended by the media, profoundly affected what went on in the courtroom. Even intermittently attentive and poorly informed segments of the public felt justified in judging Simpson's guilt or innocence—and quite beyond whether Simpson was deemed guilty or innocent, vast segments of the public approached the trial as an occasion for cultural and sociological interpretation in which the defendant and victims became relatively minor details.

The jury's not-guilty verdict determined Simpson's courtroom fate. But his broader fate, as it seems to be playing out, is being determined by the court of public opinion, and much of the public has judged him a murderer (whether or not proven so beyond a reasonable doubt) and treats him like a pariah. The trial came to affect much more than Simpson's personal fate, however. It also affected public attitudes about lawyers, the criminal justice system itself, and cameras in the courtroom, and most important of all, relations between blacks and whites throughout the country.

Everything about the case took on heightened significance because of race. The defendant was a black sports hero and entertainer; the victims (a former wife he had repeatedly abused and a male friend of hers) were both white; the leading police department investigators on the case were white, and at least one of them was an open racist; the police department itself had a notorious history of racism; and the jury that acquitted was mostly black. The trial before the jury was punctuated by racial iconography, arguments, and codes; and the trial involving the public outside the courthouse, where constraints of the courtroom were inapplicable, became even more intensely race-focused. Judge Lance Ito, who presided at the trial, excluded certain odious evidence of police racism from jury consideration as irrelevant

to its deliberations but allowed that evidence to be aired in open court, apparently for the very purpose of having it be heard by the general public. Throughout the trial, opinion polls and media interviews informed the public that it was sharply divided along racial lines about the defendant's guilt. And from the start the public debated the racial significance of the case in the media and in day-to-day life.

The racial character of the case was intensified by the backdrop of powerful historical narratives about blacks and whites that were repeatedly used (sometimes unconsciously) to shape how the basic facts of the courtroom stories were perceived or to invest those facts with some wider symbolic meaning or resonance. For some blacks, for example, Simpson became a symbolic victim of the racism facing blacks throughout U.S. history, or at least a black hero whose fall would damage an entire race; for some, the trial became a test of whether a wealthy black celebrity could beat the system as wealthy whites often had before him, or whether black jurors would strike out against evidence of continuing white racism. To the extent blacks came to see Simpson as a racially symbolic figure, instead of just one man, the actual facts of the case almost did not matter. Similarly, many whites invested the case with emblematic significance. For some whites, the evidence that a mainstream black celebrity who seemed so polished and likable might really be a brutal murderer reawakened atavistic fear and distrust of all blacks, or Simpson became the prototypical hustler using an irrelevant cry of racism to try to get away with murder. The jury was seen as not just a few individuals, most of whom happened to be black, but instead became a landmark test of blacks' capacity to wield public power and govern responsibly. The foregrounding of these wider possible meanings is what made the trial so traumatic an event in our country's tortured history of race relations.

Significantly, the racial divisions fostered by the trial were not simply over Simpson's guilt or innocence but also over how the public reacted to the not-guilty verdict. After the verdict, the public audience judged both the defendant and the trial (including the witnesses and the jury), and then different segments of the public judged each other's reactions. These public reactions to the verdict revealed—and probably deepened—a huge racial divide in the country. Televised scenes of blacks jumping for joy at the verdict shocked many whites more than the verdict itself, for that audience reaction revealed feelings and beliefs that a public opinion poll or a jury's secret vote could not. Many blacks, in turn, were angered at the aggressive disbelief many whites expressed about the verdict and its defenders, seeing that disbelief as a judgment that the mostly black jury and its defenders lacked the ability or willingness to voice the plain truth. The public audience for the trial became not simply listeners to racial narratives

but authors of racial narratives as well. And in both of these roles, the public audience shaped the trial's enduring meaning far more than the jury could. In short, the second trial—the one before the public—largely displaced the first.

Nothing, of course, was typical about the Simpson case, and very little was admirable, including the disturbing jury verdict (reached after only three hours of deliberation) and the divisions fostered by the public verdicts. But the public's central role in the Simpson case, and its eventual overshadowing of the jury, is only an extreme and distorted instance of an increasingly common situation.

Indeed, as the general public increasingly pushes its way into the criminal trial, we are witnessing a phenomenon that seems connected to a broader cultural trend in American political life. Even as our political institutions have become more representative of America's diversity—just as the jury has become so—faith in representative institutions has declined. We are witnessing a rise in a commitment to direct democracy and a weakening belief in representative democracy. This movement, like that concerning criminal trials, is fueled by technology: C-Span, instantaneous public opinion polling, fax machines, talk radio, Internet, and so forth. But technology is simply facilitating what is a moral revolution. The people believe they have a right to decide, not just at the end of the day when elections are held and their representatives' achievements are assessed, but day by day as issues receive legislative consideration. Political representatives themselves have lost either the faith or the courage to act as representatives. Daily they look to see what the public thinks, as if the public at every moment really were informed and knew how to assess its or the country's interests. This, of course, is a recipe for disaster: Representatives deliver policies that they know will not work but that satisfy some transient public mood; when the policies do not work, the public becomes further disenchanted with its representatives and demands even more direct input; that, in turn, usually produces even worse policies, and so forth. In such a climate, it becomes unthinkable—or at least terribly risky—to speak of expertise or the importance of representative democracy, or to tell “the people” that they and their frequently confused and contradictory desires are part of the problem.

In the case of politics, it can at least be said that our representatives have often failed in their roles, that they have not led strongly enough or taken even minimal chances in trying to handle the country's hard problems, or that they have too often been corrupt. But in the case of law and the courts, these points cannot be said. The courts have generally done a good job, and they have been meticulous and fair in most of the high-profile cases that galvanized the public in recent years. The media's and public's incursion into the courts is not the consequence of the courts' failures, even though it may rest in part

on the public's increasing concerns about crime. To a large extent, it rests on a combination of voyeurs' prurient interests and the media's financial motivation. And to that extent, it reflects not a wholesome measure of informed critical scrutiny but destructive self-indulgence.

I am suggesting, in short, that the widening audience for the criminal trial can corrupt the storytellers at the trial. But that cannot be the judgment that ends my account. The reality of this wider audience's engagement cannot be wished away and is likely to endure. In part it will endure because it rests on another reality: crime and fear of crime *are* more central in people's lives these days. Neither reality—the public's great concern about crime or the public's closer observation of the criminal trial—can be ignored.

If the broader public audience sees the courts to be mishandling their tasks, the credibility of the courts and of law itself will be greatly hurt. The answer, of course, cannot be to allow public opinion to influence trial verdicts; that would destroy law in the name of saving it. But the courts' understandable concern about their authority, credibility, and effectiveness may justifiably lead them to take account of certain public attitudes when that does not destroy the integrity of law.

Here, then, I come back to the issue of victim impact evidence. Taking some account of public opinion, I believe, is one reason why victim impact evidence probably has a place at the capital murder trial. (I discuss other reasons above and would not reach my overall conclusion without those reasons.) In pressing for inclusion at trial, the victim and the victim's survivors are proxies for the general public, because people at large tend to see themselves as potential crime victims. To treat victim impact evidence as off-limits, especially when such particularized evidence about the defendant is within-limits, would be to say that what the public connects with most at the trial is inadmissible. If we wish to keep public confidence in the courts and public faith in law, and if we wish to allow the courts to continue to play their role of channeling public revenge, we cannot exclude too much of the reality of life—just as we cannot let too much in.

Justice Stevens ends his dissent in *Payne v. Tennessee* by ruefully suggesting that "the 'hydraulic pressure' of public opinion" may explain the result that the majority reaches:

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described—and that properly influences the deliberations of democratic legislatures—has played a role not only in

the Court's decision to hear this case, . . . but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.⁶³

Justice Stevens's narrative is a counter-narrative of explanation that seeks to undercut the majority's very different justification for its conclusion. He has accurately described the public climate and identified a real danger. But I think he greatly simplifies the matter of public opinion and judicial action. The place of public opinion cannot be dismissed so quickly, with "a sad day" proclaimed because a great public institution may have tried to retain the confidence of its public audience. The hard reality, perhaps tragic even if not sad, is that judicial narratives must be written with some attention to wider public narratives, and this may both threaten *and* sustain the greatness of our judicial institutions.

⁶³ *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting).

APPENDIX

Victim Impact Statement Read to the Penalty-Phase Jury in Booth v. Maryland, 482 U.S. 496 (1987)

"Mr. and Mrs. Bronstein's son, daughter, son-in-law, and granddaughter were interviewed for purposes of the Victim Impact Statement. There are also four other grandchildren in the family. The victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends. He indicates that he was very close to his parents, and that he talked to them every day. The victims' daughter also spent lots of time with them.

"The victims' son saw his parents alive for the last time on May 18th. They were having their lawn manicured and were excited by the onset of spring. He called them on the phone that evening and received no answer. He had made arrangements to pick Mr. Bronstein up on May 20th. They were both to be ushers in a granddaughter's wedding and were going to pick up their tuxedos. When he arrived at the house on May 20th he noticed that his parents' car wasn't there. A neighbor told him that he hadn't seen the car in several days and he knew something was wrong. He went to his parents' house and found them murdered. He called his sister crying and told her to come right over because something terrible had happened and their parents were both dead.

"The victims' daughter recalls that when she arrived at her parents' house, there were police officers and television crews everywhere. She felt numb and cold. She was not allowed to go into the house and so she went to a neighbor's home. There were people and reporters everywhere and all she could feel was cold. She called her older daughter and told her what had happened. She told her daughter to get her husband and then tell her younger daughter what had happened. The younger daughter was to be married two days later.

"The victims' granddaughter reports that just before she received the call from her mother she had telephoned her grandparents and received no answer. After her mother told her what happened she turned on the television and heard the news reports about it. The victims' son reports that his children first learned about their grandparents' death from the television reports.

"Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to pro-

ceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents' funerals. The victims' son, who was an usher at the wedding, cannot remember being there or coming and going from his parents' funeral the next day. The victims' granddaughter, on the other hand, vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.

"The victims' son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. The victims' son states that he suffers from lack of sleep. He is unable to drive on the streets that pass near his parents' home. He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.

"The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. She wonders how this could have happened to her family because they're just ordinary people. The victims'

daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be more outgoing. She notes that she is so emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stabbings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.

"The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.

"The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets in. You are so angry and feel such rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is not able to drive near her grandparents' house and will never be able to go into their neighborhood again. The victims' granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home from work. She used to be an avid reader of murder mysteries, but will never be able to read them again. She has to turn off the radio or T.V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt that no one could help her.

"The victims' granddaughter states that the whole thing has been very hard on her sister too. Her wedding anniversary will always be bittersweet and tainted by the memory of what happened to her grandparents. This year on her anniversary she and her husband quietly went out of town. The victims' granddaughter finds that she is unable to look at her sister's wedding pictures. She also has a picture of her grandparents, but had to put it away because it was too painful to look at it.

"The victims' family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very hard on the family emotionally. The victims' son notes that he keeps seeing news reports about his parents' murder which show their house and the police removing their bodies. This is a constant reminder to him. The family wants the whole thing to be over with and they would like to see swift and just punishment.

"As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers. They attempted to answer each card personally. The family states that Mr. and Mrs. Bronstein were extremely good people who wouldn't hurt a fly. Because of their loss, a terrible void has been put into their lives and every day is still a strain just to get through. It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."